JUN 28 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

NO. 186

..... TERM, 1955

LOUIS BLUMENSCHEIN, MADELINE C. LYON, ELIZABETH REED, WILLIAM QUIGLEY, as Taxpayers of the City of Pittsburgh and as Chairman, Vice-Chairman, Secretary and Treasurer, Respectively of the North Side Protest Committee, an Unincorporated Association, on Behalf of Themselves and All Other Persons or Taxpayers Similarly Affected, Appellants

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation, Appellee

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

HARRY ALAN SHERMAN
186 Carlton House
Pittsburgh 19, Pa.

PAUL GINSBURG
Carlton House
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 430-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation, Appellee

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Pennsylvania Supreme Court entered December 13, 1954, sustaining a judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, denying relief to appellants, and respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Pennsylvania Supreme Court, 379 Pa. 566, 109 At. 2d 331. The opinion of the Allegheny County Court of Common Pleas is reported at 332 October Term, 1951, filed June 4, 1954. Copies of the Supreme Court Opinion and Order, the Chancellor's Opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

JURISDICTION

This suit was brought in equity to prevent the taking of extensive private property of appellants by the appellee within the City of Pittsburgh, pursuant to the United States Housing Act of 1937, as amended, 1949, 42 U. S.C.A. para. 1401, *et. seq.* and the Pennsylvania Housing Authority Law cited at 35 Purd. Supplement, para. 1541 *et seq.* The judgment of the Pennsylvania Supreme Court was entered December 13, 1954 and Notice of Appeal was filed in that Court on March 12, 1955. The jurisdiction of the Supreme Court to review this Decision by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2) and (3); and 2101 (c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Hammerstein v. Superior Court of California, in and for Los Angeles County,* 340 U.S. 622;*Kedroff v. St. Nicholas Cath. of Russ. Orth. Church in North America,* 344 U. S. 94; *Chaplinsky v. State of New Hampshire,* 315 U. S. 568; *Virginia Railway Co. v. U. S.,* 273 U.S. 658; *Cedar Rapids Gas Light Co., v. Cedar Rapids Iowa,* 223 U. S. 655; *Oyama v. State of*

California, 332 U.S. 633; *Demorest v. City Bank Farmers Trust,* 321 U. S. 36; *Berman v. Parker,* 75 S. Ct. 98.

QUESTIONS PRESENTED

(a) Where the United States Housing Act of 1937, Sec. 10, requires a contract between the local governing body and a Housing Authority whereby it is undertaken to eliminate slum units equivalent to low rent housing units to be constructed, and no such contract has been entered into or is of record, may the United States Public Housing Administrator approve the construction of a low rent housing project?

(b) Where the United States Public Housing Act of 1937, 42 U.S.C.A., Sec. 1401, declares the policy of the United States "to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions", and Sec. 1410 specifically provides that for each unit of construction a slum unit must be eliminated, may a State Supreme Court waive the requirements for elimination of slums in approving the construction of low rent housing projects with Federal aid?

(c) Where a Zoning Ordinance prohibition exists against multiple dwelling unit construction as contemplated in a low rent housing project, may a City Council, in violation of and without proceedings to change the said Zoning Ordinance, enter into "cooperation agreements" with the United States Public Housing Administrator for preliminary loan and program reservation for 5000 low rent dwelling units, including the 1984 units contemplated in the area here involved (it having been

declared that a Zoning Ordinance is a contract between the local government and a private property owner)?

(d) Where a State Supreme Court makes a *nisi prius* interpretation of the United States Housing Act, which involves the expenditure of extensive Federal Funds by the United States Public Housing Administrator, should the said interpretation be reviewed insofar as it affects the United States Constitution, statutes and funds?

(e) Where a Public Housing Authority under State and Federal law, declares a "need" for low rent housing and selects a first class residential area for the site of a contemplated public housing project, where other slum areas and undeveloped areas are available; where considerable grading and condemnation costs will extensively add to the total cost of the said project; and where no public hearings have been held for the determination of "need" or the selection of site; is the taking of private property a violation of the 5th and 14th Amendments of the Federal Constitution and of the United States Housing Act of 1937, as amended?

STATUTES INVOLVED

The pertinent sections of the Pennsylvania Statute of May 28, 1937, P. L. 955, as amended, 35 Pur. Supplement, para 1541 *et. seq.*; United States Housing Act of September 1, 1937, c. 896, as amended by the Act of July 15, 1949, c. 338, Title III, Sec. 307a; 42 U.S.C.A., para. 1401 *et seq.*, are set forth in Appendix B hereto.

STATEMENT

The Housing Authority of the City of Pittsburgh, a public corporation, organized and existing pursuant to the Housing Authorities Law of May 28, 1937, P. L. 955, has declared its intention of taking for low rent housing construction the properties of appellants, in a residential section of the City of Pittsburgh. An "application for reservation of urban low rent public housing" and for a preliminary loan (defendant's Exhibit E, page ...) was filed by appellee with the United States Public Housing Administration on August 17, 1949. In the said application the Authority declares that it "hereby finds that there is a need for the low rent housing applied for, which is not being met by private enterprise". Part III (page 5) of the said application states that the basis for the said determination of need was the United States Census Report of 1940. It is admitted that no independent study or survey was made by the Authority upon which to predicate its finding, incorporated in its Resolution No. 56 of 1949 (attached to the said Exhibit E) that "there exists in the City of Pittsburgh a great need for low rent public housing at rents within the means of low income families and especially families of living or deceased servicemen, which need is not being met by private enterprise".

Resolution 56 aforesaid was adopted and signed by three members of the Authority, none of whom are housing experts or economists, and all of whom admittedly relied upon the advice of the Authority's "technical staff."

No public hearing was at any time held by the Authority for the purpose of determining the existence of a need for public housing immediately preceding the filing of the application.

In March of 1950, the Authority entered into Cooperation Agreement with the City of Pittsburgh, the School District of the City of Pittsburgh, the County of Allegheny and the Allegheny County Institution District, all of which said governmental subdivisions automatically adopted the finding of a "need" for said housing as declared by the Authority without any independent survey or finding of their own. While the application for reservation aforesaid specified no specific project or location for the erection of public housing units, the Authority has admittedly determined to take by condemnation the residential properties of the appellants for the said purpose.

It is admitted that no economic depression factor or serious unemployment in the Pittsburgh area existed at the time the application was entered into.

It is admitted that a report of the Allegheny Conference on Community Development published in January, 1949, was in the possession of and the contents known to the Authority and its technical staff prior to the filing of the application for reservation. The Authority did not, prior to the determination of a need or the selection of the site here involved, set up any subcommittee for the purpose of holding hearings, receive evidence, or otherwise independently establish on a factual or evidentiary basis the said necessity or desirability of site.

It is admitted that no slum or blighted area exists in the contemplated site and no slum clearance program is in contemplation by the Authority in connection with the proposed taking.

No real estate experts were called in or consulted, and no real estate expert or economist was employed by the Authority in connection with the project, except to appraise the properties of appellants.

The Authority and its technical staff gave no consideration to the inflationary effect of the construction upon the economy of Pittsburgh, to the lack of church facilities or transportation facilities in the area.

It is admitted that new school facilities would have to be constructed to accommodate the children of the tenants in the proposed project.

A site known as Seldon Seen was suggested to the Authority, but no hearings were granted to determine the relative desirability of the said site.

It is admitted that the grading required in the project (upwards of 2,600,000 cubic yards) appeared to two of the three members voting approval of the application for reservation, to be too prohibitive a factor in the site selection as late as April, 1949.

The appellants have urged, and it has not been denied, that the Seldom Seen site does not require any grading, is half the distance from the center of Pittsburgh's Golden Triangle, and would greatly facilitate the resettlement of families to be displaced in the redevelopment of Pittsburgh's blighted hill district.

Present zoning in the proposed site prohibits the contemplated structures.

Appellants seek to enjoin the Authority from proceeding with the taking of land in the proposed site or from further processing the application for the loan before the Public Housing Administration. Four hundred ninety pages of testimony were taken ex parte appellants at the conclusion of which a motion for compulsory non-suit was made and refused. One witness, a member of the technical staff of the Authority, was called by the defendant for brief and sketchy testimony, consisting of some twenty-two pages, at which time defense rested. The lower Court, after hearing the said testimony and oral arguments of counsel, as upon final hearing, refused the relief sought and dismissed the complaint.

The majority of the Supreme Court of Pennsylvania holding, *inter alia,* (page 576) "* * * neither the Pennsylvania Housing Authorities law nor the United States Housing Act presupposes the necessary elimination of slums prior to the building of public low rent housing or requires the building of such housing to be on the same location as that where the slum area exists", dismissed the appeal. The Federal questions, including the Constitutional questions, were initially raised in the Court of Common Pleas in the Notice of Appeal to the Pennsylvania Supreme Court, filed July 9, 1954 with the Common Pleas Court en banc and included the following averment:

> "The reason for the said appeal is that the learned Court has by its opinion construed the authority of the Housing Authority of the City of

Pittsburgh in such manner as to give it arbitrary powers not contemplated in law, the effect of which is to deprive appellants of fundamental and constitutional due process in the taking of their private property by a public agency without hearing."

The Pennsylvania Supreme Court ignored the Constitutional question entirely and, after erroneously declaring that "a hearing *was* afforded to plaintiff and their counsel", (absolutely no such hearing ever having been held) goes on to say that * * * "as far as the law is concerned, there is no requirement whatever in the applicable statutes of any such hearing to be given by the Board of the Authority. The Pennsylvania Housing Authorities law (sec. 10) grants to the Authority a long, enumerated list of powers including ("y") the power "to conduct examinations and investigations and to hear testimony and take proof, under oath or affirmation, at public or private hearing, on any matter material for its information." The *power* thus granted is not a *mandate*. There is no provisions in the law as to the manner in which the Authority is to gather the information upon which to base its action, nor is there any constitutional or other legal requirement that a land owner be granted a hearing before a governmental agency vested with the right of eminent domain determines to take his land for a public use". The constitutional questions were again raised in the Petition for Reargument and Reconsideration filed with the Pennsylvania Supreme Court, which said Petition was denied by the Court and again the questions were raised in the Notice of Appeal from the Pennsylvania Supreme Court to this Honorable Court.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved in this appeal are novel and are concerned with the degree of limitation, if any, which may be placed upon a State legislature or State court of last resort in interpreting Federal Housing statutes and expenditure of Federal funds thereunder. The Pennsylvania Supreme Court has construed the United States Housing Act of September 1, 1937, c. 896, 50 Stat. 888 *et seq.*, 42 U.S.C.A., para 1401 *et seq.* as amended, contrary to its wording and intent. The said Act requires, *inter alia,* a specific agreement between a municipality and a Housing Authority set up under Pennsylvania State law, by the terms of which agreement low rent public housing units involving the expenditure of Federal funds are to be constructed only in proportion to the elimination of slum units. The Pennsylvania Supreme Court ignores this provision of the United States Housing Act and specifically states that such agreement is not essential.

The Pennsylvania Supreme Court specifically holds that a Housing Authority set up under the Pennsylvania Housing Authority law need not hold any hearings, public or otherwise, prior to the taking of high class residential property within the City of Pittsburgh.

The Pennsylvania Supreme Court in its majority opinion, in the words of the learned Michael A. Musmanno, Justice, who filed the dissenting opinion thereto, "invest non-sovereign agencies with powers never intended by the founders of our Commonwealth nor sanctioned by legislation or Court decisions".

The effect of the said majority opinion is that a Housing Authority may by its mandate usurp the powers of Zoning Boards, the Legislature, and of Congress itself in the spirit of absolutism not reviewable by the Courts.

The policies and purposes of the United States Housing Act have been completely ignored as unnecessary to a determination made on the local level in an arbitrary manner by a local Housing Authority set up under State law; yet, Federal funds are to be expended as a result of the power thus invested in said local Authority by the Pennsylvania Supreme Court decision.

The contention of appellants is that a blanket legislative finding of a "need" for low rent public housing in the year 1937 is not sufficient justification for endless taking of property and construction of public housing units in futuro without further determination of local need; it is further the contention of appellants that some form of legal, though administrative, investigation and determination upon reasonably recent circumstances and facts is essential to determination of a "need" for tax-exempt, low-rent public housing.

It is further the contention of appellants that where there is (as was amply demonstrated in the instant case) undeveloped and more advantageously situated area within the municipality, suitable for public housing, that the Public Housing Authority is acting arbitrarily when it takes property in a high class residential area instead.

Appellants contend further that in the selection of a site for the taking of property for low rent public housing purposes, that public hearing should be held

by the local Authority as part of the essential "due process" to which property owners are entitled.

The appellants urge further that under the law and under Section 10 of Art. I of the United States Constitution that a contract exists between the municipality and the property owners who build and purchase relying upon the existing Zoning laws, which said contract cannot be impaired by the Legislature, by the Courts or any administrative agency thereunder; and that any change in the zoning must be in accordance with existing procedures in law which cannot be ignored arbitrarily by an Authority.

The deprivation of appellants' properties by the local Authority in disregard of the Zoning laws, without administrative hearings and without complying with the United States Public Housing Act combine to deny "due process of law" to appellants in the within case.

The determination of necessity for taking of private property for public use resposes exclusively in the "law making branch of the government"; *Boom Co. v. Patterson,* 98 U.S. 403, 406; *U. S. v. Jones,* 109 U.S. 513; *Cherokee Nation v. Kansas Railway,* 135 U. S. 641; *Backus v. Fort Street Union Depot Co.,* 169 U.S. 557-568.

Under the 14th Amendment of the Federal Constitution, particularly the "due process of law" clause, "full opportunity to be heard" is required in the taking of property; *Backus v. Fort Street Union Depot Co., supra,* page 575. *Keyes v. Madsen,* 179 F(2) 40; 86 U. S. App. D. C. 24; cert. den. 339 U. S. 928.

The Questions Are Substantial.

The "due process of law" clauses of the 5th and 14th amendments to the United States Constitution have been variously interpreted, misinterpreted, confused and abused by writers, advocates and the courts. At least officially, however, no reported decision has gone so far as to state that these clauses were inserted in the amendments (otherwise prohibiting the taking of private property), for the express purpose of encouraging such taking.

The historical fears of official seizure of private property which compelled the adoption of the amendments, are no less justified today; for if an alert judiciary does not rally to the constitutional refuge of the citizen against the ever expanding in-roads of governmental agencies into private rights and property, then the "due process" clauses will have been legislatively translated into flood gates through which such rights and property will be swept away in the on-rushing current of paternalistic authoritarianism in government.

Certainly there is ample logic as well as law which requires a careful scrutiny on the part of any agency of any branch of government which moves to take the private property of citizens. Each word in the exception defined as "due process of law" should be carefully analyzed; what is "due" the citizen; what is "process"; what is "law"?

For a more accurate meaning of the terms inserted in the Constitution, we should rightfully search the writings and expressions of the framers thereof. At least this phase of American life should not be politically abandoned to those who have lost faith in freedom of

the individual and who now envisage themselves as those destined to save the people from themselves by establishment of a socialistic, planned economy.

The inspiration which fused breath into the ideal of self-government in a land where men were to be free welled from the Biblical revelation that individuals, as children of God, inherited freedom as a birthright. There is no freedom without the right to own property.

Just as freedom is God-given, so is our basic law which, in the Ten Commandents of Moses, is our social pattern for living together as children of God. "Thou shall not steal"; "thou shall not covet * * *", are the mandates of the Holy law upon which the Constitution and our entire body of law dealing with property rights are built.

The constitutional prohibitions are directly aimed at the power of government. A greater power is thus posed, through the individual, against the state. The Constitution has thus far stood as the impenetrable fortress of the God-inspired, God-expressed, and God-given power of the individual against man-made law and state.

For the past generation, cunning and treachery have been conceived as the tools for boring through or undermining this fortress of the free individual. In the name of "Christian charity"; in the name of "liberalism"; in the name of "the people"; in the name of the "common good and welfare"; state agencies, hitherto feared only in the images of kings, emperors and despots, have been succeeding in piece-meal disintegration of the constitutional walls of that fortress.

When the protection of the individual against the law is no longer secured by his Constitution, what then remains as his safe-guard against even despotic seizure of the legislative or executive branches of the government that was once his.

It behooves our judiciary to examine the damage already cunningly effected by the tactical legislative devices to determine whether the power of the State can yet be prevented from permanently breaking down the "due process" clauses of the 5th and 14th amendments which have hitherto stood as the flood-gates in the constitutional fortress of free man in our society.

In an early decision of the Supreme Court of the United States the late Mr. Justice Miller, then speaking for the Court, said:

> "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866."
>
> "* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected

under the forms of state legislation." *Davidson v. City of New Orleans,* 1877, 96 U. S. 97, 101.

Again in the memorable decision of this Honorable Court in *Hurtado v. People of California,* 110 U. S. 516, at page 527, this Court carefully reviews the definition of the clause "due process of law" from the authorities as follows:

> "Quoting the language of Magna Charta, and referring to Lord Oake's comment upon it, he says: 'The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice.'
>
> This accords with what is said in Westervelt v. Gregg, 12 N.Y. 202, by Denio, J., p. 212: 'The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.'
>
> The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 235-244: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'
>
> And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: 'The

principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.' "

Further, "The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of gov-

ernment, legislative as well as executive and judicial."

The office of the Courts in protecting the individuals against both legislative and executive branches of government is commented upon by the Court in that case as follows:

> "The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

An essential part of any "due process" has been held to be the public hearing, without which "star chamber" creeps back into the administration of governmental affairs.

This Honorable Court has often given voice to this essential requirement as a prerequisite to the taking of any property or in the application of "due process" to other constitutional guarantees of the individual. In the case of *Twining v. State of New Jersey,* 211 U. S. 78, at page 110-111, this Court has said:

> "We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U.S. 714, 733; Scott v. McNeal, 154 U.S. 34; Old Wayne Life Association v. McDonough, 204 U.S. 8, and that there shall be notice and

opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U.S. 398; and see Londoner v. Denver, 210 U.S. 373."

It is fundamental that "due process" refers to both substantive and procedural matters. Whitney v. California, 274 U. S. 357, 373, 71 Lawyer's Ed. 1095.

WHEREFORE, it is respectfully submitted that the questions presented by this appeal are substantial and that they are of great public importance.

Respectfully submitted,

HARRY ALAN SHERMAN
PAUL GINSBURG
Attorneys for Appellants

APPENDIX A.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LOUIS BLUMENSCHEIN, MADELINE C. LYON, ELIZABETH REED, WILLIAM QUIGLEY, as Taxpayers of the City of Pittsburgh and as Chairman, Vice-Chairman, Secretary and Treasurer, Respectively, of the North Side Protest Committee, an Unincorporated Association, on Behalf of Themselves and All Other Persons or Taxpayers Similarly Affected, Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation.

No. 254
March Term, 1954
Appeal from the Final Decree of the Court of Common Pleas of Allegheny County at No. 332 October Term, 1951.

Opinion of the Court.

Filed: November 22, 1954

HORACE STERN, C. J.

Plaintiffs, on behalf of themselves as taxpayers and all other persons similarly affected, filed a complaint in equity to enjoin the Housing Authority of the City of Pittsburgh from taking by eminent domain their properties located on a certain site selected by the Authority for a public housing project. An answer having been filed and hearing held, the Chancellor dismissed the complaint. Plaintiffs' exceptions were dismissed by the

court en banc, and from its final decree plaintiffs now appeal.

In August, 1949, the Housing Authority of the City of Pittsburgh, operating under the Housing Authorities Law of May 28, 1937, P. L. 955, as amended, passed a resolution authorizing the execution of a formal application to the Public Housing Administration for a two-year program consisting of 5,000 dwelling units of low-rent public housing and for a preliminary loan in the amount of $650,000 to cover the cost of surveys and planning in connection with the development of the program. This application declared that there was a need for low-rent housing in the City of Pittsburgh which was not being met by private enterprise, and it contained information required by the Public Housing Administration in order to guide it in determining the need of the Housing Authority of the City of Pittsburgh as compared to the need of other local Housing Authorities. Thereupon the City Council of Pittsburgh passed a resolution approving this application and likewise declaring that there existed in the City of Pittsburgh a need for low-rent public housing. The Public Housing Administration (which is an agency of the United States Government administering the federal government program of public housing in accordance with the United States Housing Act of September 1, 1937, c. 896, 50 Stat. 888 et seq., 42 U.S.C.A. §1401 et seq., as amended) approved the application for preliminary loan and made a program reservation for 5,000 low-rent dwelling units of which 3,000 units were listed for the first year's program and 2,000 units for the second year. The City of Pittsburgh, the School District of Pittsburgh, the County of Allegheny, and the County of

Allegheny Institution District each passed resolutions authorizing the execution of coöperation agreements with the Housing Authority; the agreement with the City of Pittsburgh provided that the City would furnish certain municipal services, aid in an equivalent elimination program, and make such changes in zoning as were reasonable and necessary; it provided also for payments by the Authority in lieu of taxes.

After considering twelve possible sites for projects the Board of the Housing Authority approved three of them, namely, the Bedford Avenue site located in the "Hill District" of the City, the Henger Hill site located in the "South Side" of the City, and the Summer Hill site located in the "North Side" of the City, the last named being the one involved in the present litigation and for which there was planned the construction of 1,984 dwelling units. The Housing Authority caused a topographical, property line and utilities survey to be conducted on this site, whereupon the plaintiffs, who are officers of a "North Side Protest Committee," anticipating that the properties of the residents would be condemned for purposes of the project, filed their complaint seeking an injunction against the Housing Authority from taking further action in the matter.

Plaintiffs' complaint lists a multitude of alleged illegalities in the proceedings in connection with this housing project, but they may all be reduced to three principal charges: (1) That the Board of the Housing Authority made no proper preliminary investigations or independent survey justifying their assertion that there was a need for low-rent public housing in the City of Pittsburgh, and that the alleged need which it stated

in its application for program reservation was in excess of any disclosed by competent and authoritative surveys; (2) that the selection of the Summer Hill site for a housing project was arbitrary and constituted an abuse of discretion on the part of the Authority, that a so-called "Seldom Seen" site which plaintiffs proposed would be more convenient for the persons supposed to tenant the project, and that the Authority had not held any hearings, public or private, in regard to the selection of a site; (3) that the site here in question was admittedly not a slum or blighted area and that no concomitant slum-clearance program was contemplated in connection with the project.

(1) There is no justification whatever for plaintiffs' complaint that the Housing Authority proceeded in an arbitrary, capricious manner, without any real study or investigation that naturally ought to be given to so serious a project. The learned Chancellor found—and his finding was fully justified by the evidence—that in preparing the application for program reservation the Authority properly relied upon material from the 1940 census figures as requested by the Public Housing Administration and which showed over 70,000 substandard dwellings in the City, upon excerpts from a report of the Allegheny County Conference on Community Development, upon a Report of the Bureau of Building Inspection showing the number of unsafe buildings demolished and units built during the period from 1940 to 1947, upon consultations with the Pittsburgh Housing Association, upon information obtained from the Tenant Selection Office and Management Division and from members of the technical staff of the

Authority, and upon consultations with members of the staff of the Public Housing Administration. From these sources it reached the entirely justified conclusion that there existed an acute low-rent housing shortage in the City of Pittsburgh. It may be added that the Authority also consulted various public bodies in reference to problems of water supply, sewers, playgrounds and schooling, such as the City Planning Commission, the Department of Public Works, the School Board of the City of Pittsburgh, and the Bureau of Parks and Recreation. All the data thus obtained was presented to, and considered by, the Authority at a number of meetings held during the course of almost a year. It will thus be seen that the Board acted only after securing information from various authoritative sources and holding elaborate discussions, and therefore there is no basis for the charge made by plaintiffs that its assertion of the existence of a low-rent housing shortage in the City was made arbitrarily, impetuously, or from improper motives. It is important also to bear in mind that the United States Housing Act provides (section 15) that the Public Housing Administration should not make any contract with a public housing agency for preliminary loans unless such agency had demonstrated to the satisfaction of the Administration that there was a need for such low-rent housing which was not being met by private enterprise. The fact that the Public Housing Administration approved the Housing Authority's application therefore shows that it was satisfied as to the existence of a low-rent housing need in the City of Pittsburgh.

(2) Plaintiffs claim that the Summer Hill site was a bad selection on the part of the Housing Authority

because the proposed structures on that site would allegedly interfere with presently existing zoning restrictions, the schooling, church and transportation facilities would be inadequate, and the cost of the project would be excessive. They assert that the "Seldom Seen" site, the selection of which they advocated, would have been a better choice on the alleged ground that it contained only a few dilapidated structures, required no grading of any consequence, and would involve a lower cost. The "Seldom Seen" site is not on the "North Side" of Pittsburgh; the Summer Hill site, on the other hand, is within close proximity of the blighted area in that district. It consists of an irregular tract of 179 acres lying between two valleys and presently contains only 42 houses. The technical staff of the Authority made site studies of the City, taking into consideration geography, topography, proximity to schools, the number of parcels, existing dwelling units, the assessed value of lands and buildings, estimated purchase price, proposed number of dwelling units, cost per dwelling unit, and the cost of grading, sidewalks and water lines. It was found by the Chancellor that the Summer Hill site has convenient access to commercial districts, mass transportation, public utilities and schools, and, as already stated, the City, in its coöperation agreement, agreed that it would make any reasonable and necessary changes in zoning. The Board, as already stated, studied twelve sites and finally, in the careful and conscientious exercise of its judgment, approved three of them and determined that one should be located in the "North Side" of the City as being a section which contained a considerable amount of substandard housing. Indeed, whatever may be said of the merits or demerits

of the site selected by the Housing Authority, plaintiffs wholly misconceive the extent of the judicial power to review the exercise of the Authority's discretion confided to it by the Legislature of the Commonwealth. The selection of a site for a large housing project necessarily involves many considerations; it is largely a question of practical judgment, common sense and sound discretion. By a host of authorities in our own[1] and other[2] jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not

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[1] For example: *Liggett's Petition,* 291 Pa. 109, 117, 139 A. 619, 622; *Campbell v. Bellevue Borough School District,* 328 Pa. 197, 202, 195 A. 53, 55; *Floersheim Appeal,* 348 Pa. 98, 100, 34 A.2d 62, 63, 64; *Pennsylvania Labor Relations Board v. Henry,* 361 Pa. 565, 571, 64 A.2d 764, 767; *Triolo v. Exley,* 358 Pa. 555, 558, 57 A.2d 878, 880; *Reininger Zoning Case,* 362 Pa. 116, 118, 66 A.2d 225, 226; *Schenck v. Pittsburgh,* 364 Pa. 31, 35, 36, 70 A.2d 612, 614; *Nine-Ten Chestnut Corporation v. Philadelphia Parking Authority,* 373 Pa. 274, 95 A.2d 553; *Oliver v. Clairton,* 374 Pa. 333, 340, 341, 98 A.2d 47, 51; *Lazrow v. Philadelphia Housing Authority,* 375 Pa. 586, 592, 101 A.2d 664, 667.

[2] For example: *Jarrett v. Norfolk Redevelopment and Housing Authority,* 169 F.2d 409, 411; *Matthaei v. Housing Authority of Baltimore City,* 177 Md. 506, 513, 514, 9 A.2d 835, 838; *Stockus v. Boston Housing Authority,* 304 Mass. 507, 509-512, 24 N.E.2d 333, 336, 337; *Brammer v. Housing Authority of Birmingham District,* 239 Ala. 280, 283, 195 So. 256, 258; *Chapman v. Huntington, W. Va., Housing Authority,* 121 W. Va. 319, 332, 333, 3 S.E.2d 502, 509; *In re Housing Authority of City of Charlotte,* 233 N.C. 649, 656, 65 S.E.2d 761, 766; *Neufeld v. O'Dwyer,* 79 N.Y.S.2d 53, 61, 62.

inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion. Accordingly, all jurisdictions which have had occasion to consider the question agree that a court cannot substitute its own judgment for that of a Housing Authority as to the proper site for a housing project. In the very recent case of *Lazrow v. Philadelphia Housing Authority,* 375 Pa. 586, 592, 101 A.2d 664, 667, we approved a statement in the opinion of the court below that "It is obvious that in the absence of arbitrary or capricious action by the Philadelphia Housing Authority, its determination to select the Liddonfield Site is not subject to review by our court."

Plaintiffs' complaint that the Board of the Housing Authority held no public or private hearings in connection with the selection of the site in controversy is wholly without merit. In the first place, such a hearing *was* afforded to plaintiffs and their counsel, who did in fact present their views. But furthermore, as far as the law is concerned, there is no requirement whatever in the applicable statutes of any such hearing to be given by the Board of the Authority. The Pennsylvania Hous-

ing Authorities Law (section 10) grants to the Authority a long enumerated list of power including (paragraph "y") the power "to conduct examinations and investigations and to hear testimony and take proof, under oath or affirmation, at public or private hearings, on any matter material for its information." The *power* thus granted is not a *mandate*. There is no provision in the law as to the manner in which the Authority is to gather the information upon which to base its action, nor is there any constitutional or other legal requirement that a landowner be granted a hearing before a governmental agency vested with the right of eminent domain determines to take his land for a public use.

(3) Admittedly the Summer Hill site was not itself a slum or blighted area and appellants apparently contend that low-rent housing can legally be constructed only upon some slum or blighted area which is being concurrently eliminated. Such is not the law. The Pennsylvania Housing Authorities Law states (section 2) that "The public purposes for which such authorities shall operate shall be—(1) the clearance, replanning, and reconstruction of the areas in which slums exist; (2) the providing of safe and sanitary dwelling accommodations for persons of low income, * * *; and (3) the accomplishment of a combination of the foregoing." In section 3 it defines "Housing Project" or "Project" as "any work or undertaking—(1) To demolish, clear or remove buildings from any slum area, * * *; or (2) to provide decent, safe, and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income,* * *; or (3) to accomplish a combination of the foregoing." Section 16 provides

that "In the planning and location of any housing proj-etc, an Authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which the housing authority functions." Thus it will be seen that slum-clearance projects and low-rent housing projects are distinct from one another and may be entered upon either separately or in combination. It is true that, from a practical standpoint, the providing of low-rent housing is a necessary concomitant of slum elimination (*Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 225, 200 A. 834, 842). This is evidenced by the fact that the United States Housing Act of 1937, as amended, provides (section 10) that "The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions or for capital grants pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, unless the governing body of the locality involved has entered into an agreement with the public housing agency providing that, subsequent to the initiation of the low-rent housing project and within five years after the completion thereof, there has been or will be elimination, by demolition, condemnation, effective closing, or compulsory repair or improvement, of unsafe or insanitary dwelling units situated in the locality or metropolitan area substantially equal in number to the number of newly constructed dwelling units provided by such project: * * * Provided further, That such elimination may, in the discretion of the Administration be deferred in any locality or metropolitan area where there is an acute shortage of decent, safe, or sanitary housing available to families of low income; * * * ." In the present case the Chan-

cellor found that the Housing Authority of the City of Pittsburgh has in fact eliminated a number of substandard dwelling units equal to the number of new units it has built, as required by the United States Housing Act.

It is thus clear, therefore, that neither the Pennsylvania Housing Authorities law nor the United States Housing Act presupposes the necessary elimination of slums prior to the building of public low-rent housing or requires the building of such housing to be on the same location as that where the slum area exists. Proper planning may well dictate the placing of the housing project in a location other than the blighted area even though the latter be eliminated only subsequently by process of demolition. As was said in *Dornan v. Philadelphia Housing Authority,* 331 Pa. 209, 225, 200 A. 834, 842: "True, it cannot be definitely proved that those who live in the tenements to be demolished will be those who, in whole or in part, will occupy the new dwellings, but the legislation is evidently planned to accomplish that result, and whether the object will be attained or not is a matter for the judgment and responsibility of the legislature." (See also *Allydonn Realty Corporation v. Holyoke Housing Authority,* 304 Mass. 288, 294, 295, 23 N.E. 2d 665, 668, 669; *Keyes v. United States,* 119 F.2d 444, 447). That the Housing Authority Laws do not require the Authorities to build the new low-rent housing on a slum area has been held generally in all jurisdictions: *Stockus v. Boston Housing Authority,* 304 Mass. 507, 512, 513, 24 N.E.2d 333, 338; *Chapman v. Huntington, W. Va., Housing Authority,* 121 W. Va. 319, 334, 3 S.E. 2d 502, 509, 510; *Hogue v. Housing Authority of North Little Rock,* 201 Ark. 263, 274, 144 S.W. 2d 49, 55;

Neufeld v. O'Dwyer, 79 N.Y.S. 2d 53, 59. *In re Housing Authority of City of Charlotte,* 233 N.C. 649, 660, 65 S.E. 2d 761, 769, it was said: "In the selection of a location for a housing preject as authorized under the Housing Authorities Law, the project may be built either in a slum area which has been cleared, or upon other suitable site. The housing authority is given wide discretion in the selection and location of a site for such project. * * * And the fact that a few isolated properties in an area may be taken and dismantled which are above the standard of slum properties, or that some few desirable homes will be taken, will not affect the public character of the condemnation proceeding." In *Riggin v. Dockweiler,* 15 Cal.2d 651, 653, 104 P.2d 367, 368, it was said: "the statute contains no provisions making it imperative that a new housing project be located in a slum area. * * * In working out the problem of low-cost housing, it may appear that the clearance of a slum area is desirable because the dwellings in use are insanitary, or present fire hazards or are maintained under such conditions that their removal would be in the interest of the public welfare. Also, the location may be an undesirable one for dwellings. Where such circumstances exist, it would be folly to require the new buildings to be constructed at the old location, and compel the new units to be crowded into the space taken up by those cleared away. Such an interpretation of the housing act would thwart the very purposes for which it was passed and effectively block slum clearance in districts where the problem is most acute. No such result is contemplated. Under the terms of the federal and state statutes, a housing project may be built in any location deemed desirable by those

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charged with their administration. The legislation was enacted to provide for low-cost housing incidental to slum clearance, but with no requirement that the new structures be confined to slum areas." In the same vein is *Housing Authority of City of Oakland v. Forbes,* 51 Cal. App. 2d 1, 6, 124 P.2d 194, 197.

The court below concluded—and we are equally of the opinion—that the actions of the Housing Authority here in issue were not arbitrary but were based upon full and adequate information and were in conformity with the Housing Laws of both the Commonwealth of Pennsylvania and the United States, that the competent studies made by the Housing Authority clearly revealed the need for low-rent housing in the City of Pittsburgh as stated in the Authority's application for program reservation, that the Authority did not abuse its discretion in selecting the Summer Hill site for one of its housing projects but on the contrary selected it only after a thorough study of all available sites within the City, that there is no requirement of law that housing projects be built only in blighted areas, that the coöperation agreements between the Housing Authority and the various local taxing bodies were valid, that the construction of the proposed housing will not illegally deprive plaintiffs, or any residents of the site in question, of their property or other rights without due process of law, and that therefore the plaintiffs' bill in equity was properly dismissed.

Decree affirmed at cost of appellants.

DISSENTING OPINION BY MUSMANNO, J.

Appendix A.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LOUIS BLUMENSCHEIN, MADELINE C. LYON, ELIZABETH REED, WILLIAM QUIGLEY, as Taxpayers of the City of Pittsburgh and as Chairman, Vice-Chairman, Secretary and Treasurer, Respectively, of the North Side Protest Committee, an Unincorporated Association, on Behalf of Themselves and All Other Persons or Taxpayers Similarly Affected, Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation.

No. 254
March Term, 1954
Appeal from the Final Decree of the Court of Common Pleas of Allegheny County at No. 332 October Term, 1951.

Dissenting Opinion.

Filed: November 22, 1954

MUSMANNO, J.

The Majority Opinion invests non-sovereign agencies with powers never intended by the founders of our Commonwealth, nor sanctioned by legislation or court decisions. It says that the "plaintiffs wholly misconceive the extent of the judicial power to review the exercise of the Authority's discretion confided to it by the Legislature of the Commonwealth." I do not share the Majority's disparagement of this Court's jurisdiction, nor is that disparagement justified by judicial precedent. In the case of White Oak Borough Authority, 372 Pa. 424, 427, we said only one year ago:

"Neither authorities nor municipalities are sovereigns; they have no original or inherent or fundamental powers of sovereignty or of legislation; they have only the power and authority granted them by enabling statutory legislation."

In the case of City of Pittsburgh v. Pa. Pub. Utility Comm., 171 Pa. Super. 391, 395, the Superior Court said:

"Administrative action cannot violate the fundamental principles of fairness any more than it can impinge upon any constitutional right."

The American Commonwealth would never have achieved its exalted state of democratic responsibility if government departments and administrative agencies were allowed unrestrainedly to reach out for the accomplishment of their assumed aims and objectives. Tyranny of power in its immediate application to a helpless victim can often be wielded more intolerantly by a minor official than by a monarch. The usurping decision of a zoning board which deprives a home-owner of the full enjoyment of his property can do more to make that freeholder unhappy than a tyrannical act of magnitude which generally affects the population. It is for that reason that practically every agency of government has been limited in the centrifugal sweep of its activities so that it may not encroach upon inalienable rights inherent in citizenship.

Justice Kephart, writing in White's Appeal, 287 Pa. 259, 267, said: "All grants of power are to be interpreted in the light of the maxims of Magna Carta and those things which these maxims forbid cannot be regarded as within any grant of authority made by the people to their agents: Cooley, Const. Lim. 209." He then

quoted from the eloquent statement of the Supreme Court of Texas in the case of Spann v. Dallas, 111 Tex. 350:

"To secure their property was one of the great ends for which men entered society. The right to acquire and own property, and to deal with it and use it as the owner chooses so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty,—an expression of his freedom,—guaranteed as inviolate by every American bill of rights."

In Rolling Green Golf Club Case, 374 Pa., 450, 452, Mr. Justice Bell, speaking for this Court, said:

"For centuries in England and for over 150 years in this land whose most precious heritage was liberty, an owner of land could do anything he wished with his property provided it did not interfere with his neighbor's property or create a nuisance or violate any covenant, restriction or easement, or (in this country) violate any provision of the Federal or State Constitution. In the last quarter of a century planning commissions and zoning boards have been created and multiplied; as a result many zoning ordinances have been passed to *restrict the use of property* in a manner and to a degree which the planners thought would be best for that particular community." *

The plaintiffs in this case are not threatened, however, with a mere *restriction* in the use of their prop-

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* Italics throughout, mine.

erty but with its absolute extinction. Conceding that the law, under the State's police power and authority of eminent domain, may destroy or confiscate (with compensation) this property, this still does not mean that the defendant Housing Authority is not answerable to the Courts for infringement of constitutional prerogatives. Analyzing the Pennsylvania and Federal Housing laws of 1937, Justice Horace Stern (now Chief Justice) said in the monumental case of Dornan v. Phila. Housing Authority, 331 Pa. 209, 212:

> "They [the Housing laws] are designed to accomplish, or at least facilitate, through the instrumentality of public agencies, the elimination in Pennsylvania of unsafe, unsanitary, inadequate and overcrowded dwellings, and to *substitute in their stead* decent habitations for persons heretofore compelled to live in slum areas."

The houses owned by the plaintiffs in the instant case are not "unsafe, unsanitary, inadequate or overcrowded." On the contrary, they are beautiful homes of such architectural design and exquisite construction that they could almost fall within the classification of baronial mansions.

The elimination of slums is one of the most worthy objectives of government and it could not be better described than it has by Chief Justice Stern in the Dornan case already referred to:

> "Apart from the declarations in the Housing Authorities Law itself, the veriest tyro in the study of social conditions knows that the existence of slums is a menace to the health and happiness of the com-

munity in which they exist. Not only are they the focal centers of disease, and the likely sources of fires and accidents due to overcrowding, but they exert a pernicious moral influence upon those unfortunate enough to be obliged to live in them, and thereby engender those proclivities of youth to crime which have been characterized by many in high places as a disgrace to our civilization. Because of such consideration, our statute books, from the beginning of the Commonwealth to the present time, have been replete with enactments designed to insure the safety and the sanitary condition of dwellings, and individual houses have now and then been condemned as unsafe and been torn down by public authority * * *"

But the Summer Hill development inhabited by the plaintiffs in this case is *not* a slum district. On the contrary it is a magnificent, residential area with every possible modern urban and suburban facility which can contribute to domiciliary happiness. Why destroy this admittedly perfect home site when there are numerous, unsightly slum districts in Pittsburgh crying for the dismantling pick and crowbar, the sweeping steam shovel, and the all-clearing bulldozer? The Chief Justice said further in the Dornan case:

"It appearing that all previous attempts to rid communities of their unsafe and objectionable dwellings have proved ineffective, it is now found necessary to resort to the more drastic and comprehensive method of demolishing such structures simultaneously and over more extended areas. But, as indicated in the Housing Authorities law—and indeed

it is self-evident—this cannot be done and the ultimate aim be achieved unless at the same time provision is made for sanitary and wholesome accommodations for those who will lose their homes in the process. *Certainly such persons cannot be left wholly without shelter.* For the State or a municipality to tear down objectionable houses without providing better ones in their stead would be merely to force those ejected into other slums or compel them to create new ones, and the cardinal purpose of the legislation would be frustrated. As a necessary concomitant of slum elimination, therefore, provision is made in the Housing Authorities Law for the erection, without profit, and through the enjoyment of federal subsidies, of low-cost housing projects *in which to shelter the evicted inhabitants of slum areas.*" (P. 225).

Of course, this does not mean that the new project must be built on the very exact spot of the vanquished slum. It does not mean that for every weather-beaten shingle there must now be provided a nice, new brick, that for every jagged and broken slate there must be supplied a block of marble, that for every rusty nail a polished rivet must appear, and that for every corroded pump a shining spigot must sparkle with mountain spring water. It does not mean this kind of a mathematically precise exchange, but it does mean that those for whom the housing laws were enacted should find a place under the roof of the new house built to shelter the improvident members of a community for whom democratic government has so properly, wisely and generously provided.

Appendix A.

In Schenck v. City of Pgh., 364 Pa. 21, 37, we said: "The Housing Authorities Law aimed more particularly at the *elimination of undesirable dwelling houses.*" It does not appear from the record in this case that the elimination of "undesirable dwelling houses" will be the result of the proposed plan. In fact, just the contrary is indicated. The effect of the current plan is to evict people who have no reason to move, to take them from their homes which they love and cherish, and compel them to journey to other places the whereabouts of which lie somewhere in the mysterious land of the unknown. And all this is being done in the name of slum clearance!

It is to be assumed that some slum-site not yet designated will eventually be demolished to counterbalance the catastrophe about to be inflicted upon Summer Hill, but there is no guarantee that the inhabitants of the to-be-razed slum will have an opportunity to live in the houses to rise over the cemetery of Summer Hill. It would be scant comfort indeed to announce to these enlarged slum-dwellers that some other low-income citizens will become tenants in the new housing project. Closely knit as the human family is supposed to be, that kinship is not so close that the homeless wanderer will be made happy in the thought that somebody else is receiving the benefit which his government intended for him.

A bridge that crosses a river at its only fordable location must build its abutments at certain precise places regardless of property considerations. But there is no compelling necessity for such geographical pinpointing here. The bridge of humanity which the hous-

ing legislation contemplates in this particular venture can anchor its piers in at least a dozen likely places in Pittsburgh. There were introduced in evidence in the Court below pictures of one slum concentration known as Seldom Seen. This site could well be the melancholy symbolization of a slum as described in the House Authorities Law, to wit:

> "Any area in which there is a predominance of structures which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitary facilities, or any combination of these factors, are detrimental to safety, health and morals."

No one can look upon Seldom Seen without gasping in the realization that a "Tobacco Road" of such squalor could exist within the domains of one of the most attractive, successful and progressive cities in the nation. Yet, the Tobacco Road of Pittsburgh is to remain untouched (so far as present plans are known), and its Shangri-La is doomed to the tender ministrations of the "headache ball" and the bulldozer.

It is because administrative agencies are capable of such gregarious incomprehensibilities as this that the law provides for review and correction by the Courts. The Majority Opinion says that the "selection of a site for a large housing project necessarily involves many considerations; it is largely a question of practical judgment, common sense and sound discretion." Common sense at one time was supposed to designate an untutored knowledge with a rough homely application of practical measures to given situations. The phrase, over the years, has taken on a rather discrimi-

nating connotation so that, from the category of simple, uneducated thought, it has graduated into the advanced class of select wisdom. To ascribe common sense these days to anyone is to bestow on him almost the attributes of Solomonic judgment. Applying that test to the facts in the case at bar it can scarcely be said that the Housing Authority used practical judgment, common sense and sound discretion when it consigned Summer Hill to the fate of immediate annihilation and Seldom Seen to the protective shades of an ever-crumbling perpetuity.

In the *Dornan* case, Chief Justice Stern said that the "eradication of slum areas by the demolition of objectionable dwellings is the dominant background of the Housing Authorities Law." (p. 227). But here the defendant Authority is making the elimination of highly desirable dwellings the dominating factor in its operation, even though it may intend later on, as I have suggested, to raze some unknown Augean stable.

If the fact that Seldom Seen is not on the North Side constitutes a valid reason (although it is not apparent why) for excluding it from the slum clearance program, that reason would still not make Summer Hill the logical and ideal site for liquidation. What criterion was used in selecting Summer Hill for execution, while ignoring the well-known dilapidated districts on Federal Street, Lacock Street, Cajou Way, East Ohio Street (only to mention a few on the North Side) which abound with antiquated and firetrap buildings which are a menace to the health, safety and welfare of their occupants while remaining a blot on Pittsburgh's record of progress? What standard of selectivity was adopted which disregards these blighted areas, located as they

are on level terrain and close to public transportation facilities, schools, churches and the down-town section, and how does that standard of selection at the same time sign the death warrant for the beautiful homes on Summer Hill, homes in which their owners have invested their life savings, homes in which they have taken such justifiable pride, and homes which redound to the credit and benefit of the North Side, as well as to the entire City of Pittsburgh. While, of course, there was no duty on the part of the defendant authority to locate its housing project on the exact acreage of a scrofulous area, the question recurs as to whether it did not abuse its discretion in perpetuating well-known community derelicts and eyesores while destroying one of the highest class residential developments in the City.

Abuse of discretion on the part of an administrative board with tremendous power such as that entrusted to the defendant Authority is not a minor matter. As was stated in the case of Mielcuszny v. Rosol, 317 Pa. 91, 93:

> "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overriden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or illwill, as shown by the evidence or the record, discretion is abused."

I am of the opinion that the action of the defendant Authority in this case was *manifestly unreasonable,* and as the Majority has approved that action, I accordingly

Dissent.

APPENDIX B.

The Pertinent Provisions of the Public Housing Laws.

42 U.S.C.A.

Section 1401. Declaration of policy—It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. Sept. 1, 1937, c. 896, Sec. 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, Sec. 307(a), 63 Stat. 429.

Section 1402. Definitions; When used in this chapter

(3) The term "slum" means any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to safety, health or morals.

(4) The term "slum clearance" means the demolition and removal of buildings from any slum area.

(8) The term "acquisition cost" means the amount prudently required to be expended by a public housing agency in acuiring a low-rent-housing or slum-clearance project.

Appendix B.

Section 1409. Loans for low-rent-housing and slum-clearance projects

The administration may make loans to public-housing agencies to assist the development, acquisition, or administration of low-rent-housing or slum-clearance projects by such agencies. Where capital grants are made pursuant to section 1411 of this title the total amount of such loans outstanding on any one project and in which the Administration participates shall not exceed the development or acquisition cost of such project less all such capital grants, but in no event shall said loans exceed 90 per centum of such cost. In the case of annual contributions in assistance of low rentals as provided in section 1410 of this title the total of such loans outstanding on any one project and in which the Administration participates shall not exceed 90 per centum of the development or acquisition cost of such project. Such loans shall bear interest at such rate not less than the applicable going Federal rate, plus one-half of one per centum, shall be secured in such manner, and shall be repair within such period not exceeding sixty years, as may be deemed advisable by the Administration: *Provided,* That in the case of projects initiated after March 1, 1949, with respect to which annual contributions are contracted for pursuant to this chapter, loans shall not be made for a period exceeding forty years from the date of the bonds evidencing the loan: *And provided further,* that, in the case of such projects or any other projects with respect to which the contracts (including contracts which amend or supersede contracts previously made) provide for loans for a period not exceeding forty years from the date of the bonds evidencing the loan and for annual contributions for a

period not exceeding forty years from the date the first annual contribution for the project is paid, such loans shall bear interest at a rate not less than the applicable going Federal rate. Sept. 1, 1937, c. 896, Sec. 9, 50 Stat. 891; 1947 Reorg. Plan No. 3, Secs. 1, 4(a), 9, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; July 15, 1949, c. 338, Title III, Sec. 304 (c), (d), 63 Stat. 425.

Section 1410. Annual contributions in assistance of low rentals—Authorization

(a) The Administration may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects. The annual contributions for any such project shall be fixed in uniform amounts, and shall be paid in such amounts over a fixed period of years. The Administration shall embody the provisions for such annual contributions in a contract guaranteeing their payment over such fixed period. The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions or for capital grants pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, unless the governing body of the locality involved has entered into an agreement with the public housing agency providing that, subsequent to the initiation of the low-rent housing project and within five years after the completion thereof, there has been or will be elimination, by demolition, condemnation, effective closing, or compulsory repair or improvement, of unsafe or insanitary dwelling units situated in the locality or metropolitan area substantially equal in number of newly constructed dwelling units provided by such project: *Provided, how-*

ever, That where more than one family is living in an unsafe or insanitary dwelling unit the elimination of such unit shall count as the elimination of units equal to the number of families accommodated therein: *Provided further,* That such elimination may, in the discretion of the Administration be deferred in any locality or metropolitan area where there is an acute shortage of decent, safe, or sanitary housing available to families of low income: *And provided further,* That this requirement shall not apply in the case of any low-rent housing project located in a rural nonfarm area, or to any low-rent housing project developed on the site of a slum cleared subsequent to July 15, 1949, and that the dwelling units which had been eliminated by the clearance of the site of such project shall not be counted as elimination for any other low-rent project.

Section 1411a. Prohibition of projects in localities where rejected by governing body or public vote; repayment to Federal Government; financial assistance contracts; losses; payments; examination of expenditures

Unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any

such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed:

Section 1415. Preservation of low rents

(7) In recognition that there should be local determination of the *need* for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Administration shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1947, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Administration that there is a *need* for such low-rent housing which is not being met by private enterprise.

Section 1451. Local programs—Local responsibilities considered by Administrator in extending financial assistance

(c) No contract shall be entered into for any loan or capital grant under this subchapter, or for annual contributions or capital grants pursuant to the United States Housing Act of 1937, as amended, for any project or projects not constructed or covered by a contract for

annual contributions prior to August 2, 1954, and no mortgage shall be insured, and no commitment to insure a mortgage shall be issued, under section 1715 or 1715l of Title 12, unless (1) there is presented to the Administrator by the locality a workable program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objective of such a program, and (2) on the basis of his review of such program, the Administrator determines that such program meets the requirements of this subsection and certifies to the constituent agencies affected that the Federal assistance may be made available in such community: *Provided,* That this sentence shall not apply to the insurance of, or commitment to insure, a mortgage under section 1715k of Title 12, if the mortgaged property is in an area referred to in clause (A) (i) of paragraph (1) of subsection (d) of said section, or under section 1715l of Title 12, if the mortgaged property is in a community referred to in clause (2) of subsection (a) of said section: *And provided further,* That, notwithstanding any other provisions of law which would authorize such delegation or transfer,

there shall not be delegated or transferred to any other official (except an officer or employee of the Housing and Home Finance Agency serving as Acting Administrator during the absence or disability of the Administrator or in the event of a vacancy in that office) the final authority vested in the Administrator (i) to determine whether any such workable program meets the requirements of this subsection, (ii) to make the certification that Federal assistance of the types enumerated in this subsection may be made available in such community, (iii) to make the certifications as to the maximum number of dwelling units needed for the relocation of families to be displaced as a result of governmental action in a community and who would be eligible to rent or purchase dwelling accommodations in properties covered by mortgage insurance under section 1715l of Title 12, or (iv) to determine that the relocation requirements of section 1455(c) of this title have been met.

FILED
JUL 25 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 186

LOUIS BLUMENSCHEIN, MADELINE C. LYON, ELIZABETH REED, WILLIAM QUIGLEY, as Taxpayers of the City of Pittsburgh and as Chairman, Vice-Chairman, Secretary and Treasurer, Respectively of the North Side Protest Committee, an Unincorporated Association, on Behalf of Themselves and All Other Persons or Taxpayers Similarly Affected, Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, a Corporation

MOTION TO DISMISS

EVERETT E. UTTERBACK
WILLIAM H. MENDLOW
THEODORE L. HAZLETT, JR.
Attorneys for Appellee

200 Ross Street
Pittsburgh 19, Pa.

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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MOTION TO DISMISS

The Appellee in the above entitled case, in support of its Motion to Dismiss respectfully show the following:

I. COUNTER-STATEMENT OF CASE

Appellants filed a Complaint in Equity in the Court of Common Pleas of Allegheny County to enjoin appellee from taking any of the land located on a certain site selected by appellee for a low-rent public housing project. On hearing of the case, the Chancellor dismissed the Complaint. Exceptions were taken by the appellants and after oral argument, were dismissed by the court en banc. Appellants then appealed to the Supreme Court of Pennsylvania which court affirmed the Decree of the

Court of Common Pleas of Allegheny County, whereupon appellants now seek to appeal to this Honorable Court.

On August 17, 1949, the Appellee passed a resolution authorizing the execution of a formal application to the Public Housing Administration to reserve 5,000 dwelling units of low-rent housing and for a preliminary loan in the amount of $650,000 to cover the cost of surveys and planning in connection with the development of the program. The application declared a need for low-rent housing in the City of Pittsburgh which was not being met by private enterprise and contained information required by the Public Housing Administration in order to guide it in determining the need of Appellee as compared to the need of other local housing authorities. The City of Pittsburgh, County of Allegheny, the School District of Pittsburgh and the County of Allegheny Institution District each passed resolutions authorizing the execution of Cooperation Agreements with the Housing Authority of the City of Pittsburgh, Appellee herein. The Agreement with the City of Pittsburgh provided that the City would furnish certain municipal services, aid in an equivalent elimination program, and make such changes in zoning as were reasonable and necessary; it provided, also, for payments by the Appellee in lieu of taxes. For eighteen months prior to the filing of the application, Appellee had been studying possible sites on which public housing could be constructed. After studying in detail twelve possible sites for projects, the Authority approved three sites including the site now involved in litigation. The Appellee caused topographical property line and utility surveys to be conducted on this site, whereupon the Appellants anticipating that the properties of the residents residing within the site would be condemned

for purposes of the project, filed their Complaint seeking to enjoin the Housing Authority of the City of Pittsburgh from taking any further action in the matter.

II. APPELLANTS REMEDY, IF ANY, IS A PETITION FOR WRIT OF CERTIORARI AND NOT APPEAL.

The statutory provision relied on by Appellants, does not sustain the jurisdiction of the United States for the reason that it is not in conformity with the *Act of June 25, 1948 c 646, 62 Stat. 929, 28 U.S.C.A. 1257,* which reads as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

> "(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Neither of the above quoted sections is applicable to the questions presented in this case and none of the cases cited by appellant in support of jurisdiction applies to this case. The Hammerstein case, cited by Appellants, was a case in which final judgment had not been secured by the highest court of California, and all of the other cases involved the constitutionality of State statutes.

III. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE ATTEMPTED APPEAL.

Appellants have presented the following questions:

(a) Where the United States Housing Act of 1937, Sec. 10, requires a contract between the local governing body and a Housing Authority whereby it is undertaken to eliminate slum units equivalent to low rent housing units to be constructed, and no such contract has been entered into or is of record, may the United States Public Housing Administrator approve the construction of a low rent housing project?

(b) Where the United States Housing Act of 1937, 42 U. S. C. A., Sec. 1401, declares the policy of the United States "to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions", and Sec. 1410 specifically provides that for each unit of construction a slum must be eliminated, may a State Supreme Court waive the requirements for elimination of slums in approving the construction of low rent housing projects with Federal aid?

(c) Where a Zoning Ordinance prohibition exists against multiple dwelling unit construction as contemplated in a low rent housing project, may a City Council, in violation of and without proceedings to change the said Zoning Ordinance, enter into "cooperation agreements" with the United States Public Housing Administrator for preliminary loan and program reservation for 5000 low rent dwelling units, including the 1984 units contemplated in the area here involved (it having been declared that a Zoning Ordinance is a

contract between the local government and a private property owner)?

(d) Where a State Supreme Court makes a nisi prius interpretation of the United States Housing Act, which involves the expenditure of extensive Federal Funds by the United States Public Housing Administrator, should the said interpretation be reviewed insofar as it affects the United States Constitution, statutes and funds?

(e) Where a Public Housing Authority under State and Federal law, declares a "need" for low rent housing and selects a first class residential area for the site of a contemplated public housing project, where other slum areas and undeveloped areas are available; where considerable grading and condemnation costs will extensively add to the total cost of the said project; and where no public hearings have been held for the determination of "need" or the selection of site; is the taking of private property a violation of the 5th and 14th Amendments of the Federal Constitution and of the United States Housing Act of 1937, as amended?

These questions presented by Appellants are not properly raised for the reasons that they are new to this case. Neither question (a) nor question (b) was raised by Appellants in their appeal to the Supreme Court of Pennsylvania nor were they raised in their notice of appeal to this Honorable Court. The questions not being raised below, it is proper that no rulings were made thereon. The presenting of these questions at this time is untimely and they should not be considered. The statute involved in these questions is Section 10(a) of

the United States Housing Act of 1937, as amended by the Housing Act of 1949, (42 U. S. C. A. Sec. 1410(a)) which provides in part as follows: * * * "The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions or for capital grants pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, unless the governing body of the locality involved has entered into an agreement with the public housing agency providing that, subsequent to the initiation of the low-rent housing project and within five years after the completion thereof, there has been or will be elimination, by demolition, condemnation, effective closing, or compulsory repair or improvement, of unsafe, or insanitary dwelling units situated in the locality or metropolitan area substantially equal in number of newly constructed dwelling units provided by such project: Provided, however, That where more than one family is living in an unsafe or insanitary dwelling unit the elimination of such unit shall count as the elimination of units equal to the number of families accommodated therein: Provided further, That such elimination may, in the discretion of the Administration be deferred in any locality or metropolitan area where there is an acute shortage of decent, safe, or sanitary housing available to families of low income". An examination of the record will reveal that the only application for a loan made by Appellee was an Application for a Preliminary Loan, which application was introduced by Appellee, as defendants "Exhibit A" and which application is referred to by Appellants in their Jurisdictional Statement (page 5) and by Chief Justice Stern in his opinion which is printed in the Jurisdictional State-

ment (appendix A, page 21). The Statute, above quoted and relied on by Appellants specifically excludes "Preliminary Loans" from its provisions. Nevertheless Appellee did conform to the provisions of the Statute and entered into a Cooperation Agreement with the City of Pittsburgh in March of 1950, which agreement was introduced into evidence as defendants Exhibit "B". The agreement contains the requirements of the section of the United States Housing Act quoted above as noted in the 17th Finding of Fact of the Chancellor (Record, Page 56a). The Chancellor also concluded in his 7th Conclusion of Law that "The Cooperation Agreements between the Housing Authority of the City of Pittsburgh and the various taxing bodies were valid, being authorized by the proper governing bodies of the Authority and the local taxing bodies. (Record, page 84a) From this 17th Finding of Fact and 7th Conclusion of Law the Appellants did not appeal to the Pennsylvania Supreme Court. (See questions involved, page 1, and Summary of Argument, page 6, of Appellants Brief to the Supreme Court of Pennsylvania.) Appellants argument that the Pennsylvania Supreme Court waived the requirement for elimination of slums is not supported by any evidence. In fact the Court noted the finding by the Chancellor that "the Housing Authority of the City of Pittsburgh has in fact eliminated a number of sub-standard dwelling units equal to the number of new units it has built, as required by the United States Housing Act." (Jurisdictional Statement pages 29 and 30)

Question C is also unsubstantial, and was not argued or pursued before the Pennsylvania Supreme Court. In the first place, the question contains an error of fact. The City of Pittsburgh, at no time, entered into a Co-

the properties of the Appellants, they will have an opportunity to be heard on all questions to which they are entitled to a hearing under the steps required to be taken precedent to the right of the exercise of the power of eminent domain.

IV. CONCLUSION

All of the questions relating to this case and raised before the Pennsylvania Supreme Court were decided upon adequate state grounds.

Wherefore Appellee respectfully submits this statement showing that the questions upon which the decision of this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this Appeal or, alternately, that the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

EVERETT E. UTTERBACK
WILLIAM H. MENDLOW
THEODORE L. HAZLETT, JR.
Attorneys for Appellee

October 10, 1955. 350 U. S.

No. 186. BLUMENSCHEIN ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF PITTSBURGH. Appeal from the Supreme Court of Pennsylvania, Western District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Paul Ginsburg* for appellants. *Theodore L. Hazlett, Jr.* for appellee. Reported below: 379 Pa. 566, 109 A. 2d 331.